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Opinion regarding the proposal to aggravate incarceration conditions of prisoners associated with Hamas

The decision in principle made by the Ministerial Committee for Security Affairs, regarding downgrading the conditions in which prisoners associated with Hamas are held, in response to the abduction of the youths on June 12, 2014, is wrongful and fails to meet legal requirements. The decision in principle, which, according to the media, was made on June 14, 2014, has been transferred for review and decision by the Ministry of Public Security. Among the measures considered, the media reported the possibility of interfering with the prisoners' right to family visits. Before any concrete decisions are made, we find it necessary to address the principled, legal aspect of such measures, should they be passed.

Measures intended to downgrade prison conditions for Hamas affiliated prisoners are wrongful for four major reasons. First among these is the basic fact that the **prisoners enjoy rights vested in them by law**, Israeli as well as international, and any interference with these rights must meet the tests of reasonableness and proportionality, a conditions which is not fulfilled in the case at hand. This holds true both specifically in the case of family visits in prisons, which we address below, and generally. The second reason concerns the **wrongful discrimination** of prisoners affiliated with Hamas, should the spirit and language of the cabinet's decision be realized. Such discrimination is prohibited under both Israeli and international law. The third reason is that downgrading prison conditions constitutes **collective punishment**, which is prohibited under international law. The fourth and final reason is the fact that the purpose of collectively punishing Hamas affiliated prisoners is to use them as **bargaining chips** in order to put pressure on individuals over whom they have no control, a wrongful and immoral act per se.

We shall review the four reasons in order.

A. Prisoner Rights by Law

> The conclusion is that the establishment of special arrangements regarding security prisoners is justified… It is evident, however, that these arrangements must meet the legal tests that generally apply to administrative decisions: **They must be relevant, reasonable, and proportionate. Thus, for example, a restriction on contact with**

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> **persons outside the prison is not to be imposed on security prisoners if it is not required on the basis of security considerations or other relevant considerations and is due solely to considerations of punishment or vindictiveness, or if it injures the prisoner beyond the measure required by relevant considerations.**
> PPA 1076/95 **State of Israel v. Quntar** IsrSC 50(4) 492, 501.

The right to family visits in prison

The right to receive family visits in prison facilities is a fundamental right of both the prisoners and their relatives. It is a basic right that stems from the concept that human beings are social creatures who live in families and communities and from the fundamental right to family life. The right to receive family visits is enshrined in a number of legal sources, both Israeli and international. Notable among them are the Fourth Geneva Convention, which stipulates in Article 116 thereof:

> **Every internee shall be allowed to receive visitors, especially near relatives, at regular intervals and as frequently as possible**. As far as is possible, internees shall be permitted to visit their homes in urgent cases, particularly in cases of death or serious illness of relatives.

and Section 47 of the Prison Ordinance (New Version) 5732-1971, and Commissioner's Ordinance 04.42.00 titled "Prisoner Visit Procedures", which stipulates in Section 1 thereof:

> **The visit is one of the important means of contact between the prisoner and his family, friends, and acquaintances**. The visit may help the prisoner during his time in prison and encourage him in times of crisis.

The following was held in the opinion of Justice Procaccia in LHCJA 6956/09 **Maher Yunis et al. v. Israel Prison Service**, TakSC 2010(4), 189, para. 8:

> Indeed, prison leaves and visits may also be regarded as part of the human rights to which they remain entitled while in prison, and which are not necessarily nullified merely due to the deprivation of liberty resulting from the incarceration, fruit of the penal sanction.

> **Leaves and family visits are some of the means of communication between a person-prisoner and the world and the people close to him. He needs them by virtue of his nature. They are part of his self as a human being. They are part of his human dignity. They make an important contribution to his welfare and rehabilitation during his incarceration**.

The Standard Minimum Rules for the Treatment of Prisoners, 1995 establish in Rule 37:

> Prisoners shall be allowed under necessary supervision to communicate with their family and reputable friends at regular intervals, both by correspondence and by receiving visits.

Rule 92 addresses detainees who have not been tried, and establishes:

> **An untried prisoner… shall be given all reasonable facilities for communicating with his family and friends, and for receiving visits from them, subject only to restrictions and supervision as are necessary in the interests of the administration of justice and of the security and good order of the institution.**

The ICRC's comprehensive study on customary international humanitarian law determined that **prisoners' and detainees' right to visits is a recognized right under customary international law**:

> **Rule 126. Civilian internees and persons deprived of their liberty in connection with a non-international armed conflict must be allowed to receive visitors, especially near relatives, to the degree practicable.** …In a resolution adopted in 1999, the UN General Assembly demanded that Yugoslavia respect the requirement to allow detainees to receive family visits in the context of the conflict in Kosovo (UNGA Res.54/183). In the **Greek case** in 1969, the European Court of Human Rights condemned the severe limitations on family visits to detainees. In 1993, the Inter-American Commission on Human Rights recommended that Peru allow

> relatives to visit prisoners belonging to the Tupac Amaru Revolutionary Movement.
>
> JM Henckaerts, L. Doswald-Beck, **Customary International Humanitarian Law** p. 448-449 (Volume I: Rules. 2005)

Other countries faced with security issues and concerns have dealt with the issue of visits to prisoners defined as security prisoners. The Grand Chamber of the European Court of Human Rights addressed the prison conditions of Abdallah in Öcalan, accused by the Turkish authorities of heading the Kurdish Resistance group, the PKK. Öcalan received the death penalty, which was subsequently commuted to a life sentence, and was held, for obvious reasons, under maximum security conditions. Despite this, according the Grand Chamber's verdict, Öcalan received weekly visits from relatives:

> 192 In the present case, it is true that the **applicant's detention posed exceptional difficulties for the Turkish authorities. The applicant, as the leader of a large, armed separatist movement, is considered in Turkey to be the most dangerous terrorist in the country...**
> 193 The applicant's prison cell is indisputably furnished to a standard that is beyond reproach… the Court notes that the cell which the applicant occupies alone is large enough to accommodate a prisoner and furnished with a bed, table, armchair and bookshelves. It is also air-conditioned, has washing and toilet facilities and a window overlooking an inner courtyard…
> **194 …He sees a doctor every day and his lawyers and members of his family once a week**.
>
> **Öcalan v. Turkey** (Application No. 46221/99 p. 1046-1047).

Moreover, the right to visits is not just the prisoner's right. International law recognizes it as the right of the prisoner's relatives, whose contact with the prisoner is severed once the prisoner is incarcerated. The issue is summarized by one scholar as follows:

> People who are sent to prison lose the right to free movement but retain other rights as human beings. One of the most important of these is the right to contact with their families. **As well as being a right for the prisoner, it**

> **is equally a right for the family members who are not in prison**. They retain the right of contact with their father or mother, son or daughter, brother or sister who has been sent to prison. Prison administrations have a responsibility to ensure that these relationships can be maintained and developed. Provision for all levels of communication with immediate family members should be based on this principle. It follows that the loss or restriction of family visits should not be used as a punishment under any circumstances.
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> Coyle A. A **Human Rights approach to prison management: A handbook for prison staff** International Centre for Prison Studies (King's College, University of London and the UK Foreign and Commonwealth Office) 2002. p 95.

<u>Prisoners retain their rights during incarceration</u>

The right to family visits in incarceration facilities and other basic rights to which prisoners are entitled also stem from the overarching concept both in international and Israeli law, that a person's incarceration does not mean the denial of his basic rights. Prison walls may limit the prisoner's freedom of movement, with everything this entails, but this does not mean the expiration of his other fundamental rights, with the exception of those denied by virtue of an express statutory provision:

> **We have a great rule that any of the human rights to which a person is entitled by virtue of their humanity is maintained even if the person is subject to detention or imprisonment, and imprisonment in itself cannot deny him any right, except when such is derived from and inherent in the denial of his freedom of movement, or when an explicit statutory provision so orders** … This rule has been rooted in Jewish heritage since antiquity: As stated in Deuteronomy 25, 3: 'then thy brother should seem vile unto thee', the sages established a major rule in Hebraic penal doctrine: 'when beaten – he is like your brother' (Mishna, Makot, 3, 15). **And this great rule is relevant not only after he has completed his sentence but also while serving a sentence, because he is your brother and friend, and he retains and is**

> **entitled to his rights and dignity as a human being**.
>
> HCJ 337/84 **Hukama v. Minister of Interior** IsrSC 38(2) 826, 832.

Similarly, Article 10(1) of the International Covenant on Civil and Political Rights stipulates:

> All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

This article was very broadly interpreted by the UN Human Rights Committee, the body charged with overseeing the implementation of the Covenant, in its CPPR General Comment No. 21, dated April 10, 1992:

> [R]espect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons. **Persons deprived of their liberty enjoy all the rights set forth in the Covenant, subject to the restrictions that are unavoidable in a closed environment**.

Sections 1 and 5 of the Basic Principles for the Treatment of Prisoners, adopted by the UN General Assembly (Resolution 45/111, December 14, 1990), also determine the principle that prisoners are entitled to all human rights except those denied by virtue of the imprisonment itself. According to Section 1:

> All prisoners shall be treated with the respect due to their inherent dignity and value as human beings.

And according to Section 5:

> Except for those limitations that are demonstrably necessitated by the fact of incarceration, **all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights,** and, where the State concerned is a party, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and the Optional Protocol thereto, as well as such other rights as are set out in other United Nations covenants.

The various provisions regarding prison visits allow restrictions on this right, including for security reasons. However, as any restriction of a fundamental right, such restrictions must be imposed within the confines of reasonableness and proportionality, and weight must be given to the importance of the right that is being impinged. In the matter herein, the decision to restrict or revoke prisoners' right to visits, or any other right to which they are entitled as prisoners, solely because of their alleged affiliation with Hamas, fails to meet the tests of reasonableness and proportionality as established in the jurisprudence of the Supreme Court.

B. Wrongful Discrimination

The decision in principle made by the Ministerial Committee for Security Affairs constitutes wrongful discrimination of Hamas affiliated prisoners. The decision stipulates a downgrade in holding conditions to all prisoners in this group, compared to other "security prisoners", solely on the basis of their political-organizational affiliation.

It is a known rule of Israeli law that equality is supreme and foremost among legal rules. Following the enactment of Basic Law: Human Dignity and Liberty, the right to equality was recognized as forming part of the human right to dignity, according to an interim model, according to which human dignity is not confined to mental harm or degradation and slander that strike at the nucleus of human dignity (see Justice Dorner, HCJ 4541/94 Miller v. Minister of Defense [1995-6] IsrLR 1, but also discrimination that is not associated with degradation, provided that it has a close and pertinent connection to human dignity (see HCJ 7052/03 **Adalah – Legal Center for Arab Minority Rights in Israel v. Minister of Interior** [2006] (1) IsrLR 443, para. 39 of the opinion of President A. Barak).

The duty not to discriminate, which is but the mirror image of the human right to dignity rests primarily with government authorities. "An authority may not discriminate, which means treating equals unequally and unfairly" (HCJ 1703/92 **C.A.L Cargo v. Prime Minister**, IsrSC 52(4) 193, 204, and HCJ 678/88 **Kfar Vradim v. Minister of Finance**, IsrSC 43(2) 501, 507-508 (hereinafter: **Kfar Vradim**).

In **Kfar Vradim**, the Court ruled that equals must be treated equally and that non-equals should receive treatment that is commensurate with the differences between them (Ibid., 507). Thus, clearly, the different treatment of a particular group within the general population of so-called "security prisoners", which is differentiated only by the alleged political and organizational affiliation of its members, constitutes wrongful discrimination that has been prohibited in the jurisprudence of the Supreme Court. In this spirit, President Barak quotes Justice Haim Cohen, who stated as follows:

> The dignity that may not be infringed upon and which merits protection is not only a person's reputation, but also his status as one among equals. The harm to his dignity is not only a result of slander or insults and vilification, but also discrimination and oppression, prejudicial and racist or degrading treatment. The protection of human dignity means not only a prohibition on slander, but also securing equality in rights and opportunities, and the prevention of discrimination based on sex, religion, race, language, opinion, **political or social affiliation**, family lineage, ethnic origin, property, or education (H. Cohen, **The Values of a Jewish and Democratic State**, page 32).
>
> (HCJ 6472/02 **Movement for Quality Government in Israel v. the Knesset**, TakSc 2006(2), 1559, 1578.

Furthermore, such discrimination in strictly prohibited under international law. Article 14 of the European Convention on Human Rights explicitly states that:

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, **political or other opinion**, national or social origin, association with a national minority, property, birth or other status.

Article 26 of the International Covenant on Civil and Political Rights, which specifically addresses the prohibition on discrimination based on political affiliation, states that:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, **political or other opinion**, national or social origin, property, birth or other status.

This Article was interpreted by the Human Rights Committee, in CCPR General Comment No.21, as follows:

> This rule must be applied without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The bottom line is clear – the discrimination of one group of prisoners solely on the basis of the organizational-ideological-political affiliation of its members cannot stand, and this too before considering the not-insignificant practical difficulties associated with the actual implementation of such discrimination. However, this discussion is beyond the scope of this opinion.

C. Collective Punishment

The decision in principle made by the Ministerial Committee for Security Affairs constitutes collective punishment of prisoners affiliated with Hamas, as this punishment is imposed on all members of this group simply because of their organizational affiliation without individual examination.

Collective punishment is prohibited under international law, both under the laws of war and under international human rights law. The governing principle which prohibits the use of sweeping and arbitrary punitive measures that harm entire groups of people also forms an important part of the rules of customary international law.

Since this matter involves prisoners who are residents of an occupied territory, defined as "protected persons", Article 50 of the Hague Regulations applies:

> No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible.

Article 33 of the Geneva Convention stipulates:

> No protected person may be punished for an offence he or she has not personally committed. **Collective penalties and likewise all measures of intimidation or of terrorism are prohibited**. Pillage is prohibited.

The ICRC's interpretation clarifies that the difference between the Hague Regulations and the provisions of the Fourth Geneva Convention, lies also in that:

> The Provision is very clear. If it is compared with Article 50 of the Hague Regulations, it will be noted that that Article could be

> interpreted as not expressly ruling out the idea that the community might bear at least a passive responsibility.
> Thus, a great step forward has been taken. **Responsibility is personal and it will no longer be possible to inflict penalties on persons who have themselves not committed the acts complained of**.
>
> J.S. Pictet, **Commentary: IV Geneva Convention – Relative to the Protection of Civilian Persons in Time of War**, p. 225 (Geneva, 1958).

It is interesting to note that Pictet interprets the prohibition on the use of "measures of intimidation or of terrorism," not only as aimed at defending protected persons under occupation, but also as a prohibition that accords with the interests of the occupier:

> During past conflicts, the infliction of collective penalties has been intended to forestall breaches of the law rather than to repress them; in resorting to intimidatory measures to terrorise the population, the belligerents hoped to prevent hostile acts. **Far from achieving the desired effect, however, such practices, by reason of their excessive severity and cruelty, kept alive and strengthened the spirit of resistance. They strike at guilty and innocent alike. They are opposed to all principles based on humanity and justice and it is for that reason that the prohibition of collective penalties is followed formally by the prohibition of all measures of intimidation or terrorism with regard to protected persons, wherever they may be**.
>
> Pictet, Commentary, p. 225-226.

Article 75(2)(d) of Protocol I Additional to the Geneva Convention also states that:

> (2) The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents…

(d) collective punishments

The ICRC's interpretation of this Article clarifies that:

> 3055. **The concept of collective punishment must be understood in the broadest sense: it covers not only legal sentences but sanctions and harassment of any sort, administrative, by police action or otherwise**.
>
> (Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949. p. 874 (Yves Sandoz, Christophe Swinarski, Bruno Zimmermann, Eds. ICRC, Geneva, 1987).

Section 29 of the Basic Principles for the Treatment of Prisoners, which concerns discipline and punishment, provides unequivocally that a prisoner may not be punished except in accordance with the law, and for an offense committed by the prisoner himself:

> **Discipline and punishment**
>
> 29. The following shall always be determined by the law or by the regulation of the competent administrative authority:
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> (a) Conduct constituting a disciplinary offence;
>
> (b) The types and duration of punishment which may
>
> be inflicted;
>
> (c) The authority competent to impose such punishment.
>
> 30. (1) No prisoner shall be punished except in accordance with the terms of such law or regulation, and never twice for the same offence.
>
> (2) No prisoner shall be punished unless he has been informed of the offence alleged against him and given a proper opportunity of presenting his defence. The competent authority shall conduct a thorough examination of the case.

Hence, downgrading the already harsh incarceration conditions of Palestinian "security" prisoners solely due to their alleged affiliation with Hamas constitutes unlawful collective punishment, as it is clear that the downgrade is not intended to address any security need.

D. Use of Hamas Affiliated Prisoners as "Bargaining Chips"

As stated above, the reason for the imposition of sanctions against prisoners affiliated with Hamas, is "punishment" for the abduction of the youths. With all due respect, collectively depriving individuals of their basic rights, for punitive purposes that are not personally related to the individuals who are being punished, is not among the permissible measures in a law-abiding state.

Denying visits, or other rights, as per the decision, means Palestinian prisoners are used as "bargaining chips" for the purpose of exerting pressure on an organization that is external to them. Using human beings as bargaining chips for this purpose was unequivocally disqualified by the Supreme Court, as stated by (then) President Barak, whose comments apply equally to our case:

> I am aware of the suffering of the families of IDF soldiers who are missing or held captive. It is heavy as a stone. Even more painful is the condition of the captive who is held in secret and in hiding, ripped from his home and homeland. Indeed, I am not oblivious to this pain, along with the prime interest of the State of Israel to return its sons back home. It did not escape me when I rendered my decision in ADA 10/94. It has not lessened from then until this day. We carry with us the human and social tragedy of captive and missing persons day in and day out. **However, as important as the purpose of the release of prisoners and missing persons may be, it cannot – in the context of the law being the subject matter of the petition before us – legitimize all means. It is not possible – in the legal situation before us – to right a wrong with a wrong.** I am confident and certain that the State of Israel will not rest until it finds a way to solve this painful problem. As a state and a society, we shall take comfort in the fact that the way to the solution will suit our foundational values.
>
> CrimFH 7048/97 **A v. Minister of Defence**,

IsrSC 54(1) 721, 744.

It is important to note that according to the Fourth Geneva Convention, violations of the Convention by one party have no bearing on the obligation of the other party to uphold the provisions of the Convention. The undertakings which Israel assumed upon itself when it ratified the Fourth Geneva Convention should not be affected by the fact that the other party does not abide by its provisions.

As Pictet wrote:

> It (the Fourth Geneva Convention – D.S.) is not an engagement concluded on a basis of reciprocity, binding each party to the contract only in so far as the other party observes its obligations.
>
> Pictet, **Commentary** p.15.

This lack of reciprocity was also recognized by Israeli case law, as stated by the Supreme Court:

> **One might ask: are the petitioners entitled to have humanitarian considerations taken into account in their matter? They are members of terror organizations that have no truck with humanitarianism, and for whom attacks on the innocent are a way of life.… Our reply to these questions is: The State of Israel is a state of law; the State of Israel is a democracy that respects human rights, and which seriously weigh humanitarian considerations**. We make these considerations because compassion and humanity are ingrained in our character as a Jewish and democratic state; we make these considerations because the dignity of every person is dear to us, even if he is one of our enemies… We are aware of the fact that this approach ostensibly grants an "advantage" to the terror organizations that have no truck for humanity. However, this is a transient "advantage." Our moral approach, the humanity of our position, the rule of law that guides us – all these constitute an important part of our security and strength. At the end of the day, this is our advantage.

HCJ 794/98 **`Obeid v Minister of Defence**,
IsrSC 55(5). 769, 775.

Conclusion

The decision made by the Ministerial Committee for Security Affairs regarding the possibility of downgrading the conditions in which Hamas affiliated prisoners are held, fails to meet the most basic legal tests established both in Israeli law and in international law.

Among others, this decision constitutes a severe, unreasonable and disproportionate violation of the fundamental rights of prisoners held in Israel and their families. Note, as we specified in detail above, these are not privileges given to the prisoners out of the kindness of the Israeli law enforcement authorities. These are, as demonstrated, fundamental rights that prisoners held in the custody of the state have as human beings. Any other view on this topic inherently contradicts the jurisprudence of the Supreme Court and international law.

This decision also severely undermines equality between all prisoners considered security prisoners, and therefore, constitutes wrongful discrimination based organizational-political affiliation. Furthermore, it constitutes collective punishment of a large group of prisoners, which is absolutely prohibited by any law. Finally, the decision turns a large group of prisoners into "bargaining chips" for the resolution of a matter over which they have no direct control or influence.

Due to all the above, the decision the Ministerial Committee for Security Affairs, and the operative decisions that may be made following this decision, are extremely unreasonably and therefore must be withdrawn.

Jerusalem, June 18, 2014.